February 24, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: State of Nevada

Date of Filing: January 26, 2006

Case Number: TFA-0144

On January 26, 2006, the State of Nevada (the Appellant) filed an Appeal from a final determination issued on December 28, 2005 by the Department of Energy's (DOE) Office of Repository Development (ORD). In that determination, ORD responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. ORD's determination identified two documents as responsive to this request. ORD withheld both documents under FOIA Exemption 5. This Appeal, if granted, would require ORD to release both documents to the Appellant.

I. BACKGROUND

On November 28, 2005, the Appellant filed a Request for Information with ORD seeking two documents: "the draft License Application submitted to DOE by its contractor, Bechtel-SAIC Company, LLC, on July 26, 2004," and "the September 2004 iteration of the draft License Application." Appeal at 2. On December 28, 2005, ORD issued a determination letter (the Determination Letter) withholding both documents, in their entirety, under FOIA Exemption 5's deliberative process, attorney work product, and attorney-client privileges.[1] The ORD also asserted a fourth privilege which it has identified as "the litigation work product privilege."[2]

[1] The Determination Letter provides no justification for ORD's withholding of information under the attorney-client privilege. However, since the Appeal does not address ORD's withholdings under the attorney-client privilege, we need not address this issue.

[2] While ORD asserts that the litigation work product privilege and the attorney work product privilege constitute separate and distinct privileges, we find no support for this contention in the case law or statutes. While the Nuclear Regulatory Commission's regulations provide for a litigation work product privilege, that privilege is unavailable under the FOIA. The Supreme Court has held repeatedly that Exemption 5 exempts "those documents, and *only* those documents, normally privileged in the *civil* discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (emphasis supplied); *see FTC v. Grolier Inc.* 462 U.S. 19, 26 (1983).

On January 27, 2006, the Appellant submitted the present Appeal challenging ORD's withholding determinations under Exemption 5. Specifically, the Appellant contends that:

1. information contained in the withheld documents cannot be withheld under the litigation work product exemption,
2. the description of the withheld documents contained in the Determination Letter is inadequate,
3. ORD failed to segregate information properly withheld under the deliberative process privilege from factual information which cannot be withheld under the deliberative process privilege, and
4. ORD failed to weigh the public interest in disclosure against the harm that may result from disclosure.

Appeal at 3-4.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only the application of Exemption 5 is at issue in the present case.

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, **and** it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Department of the Interior v. Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*) (emphasis supplied). "The first condition of Exemption 5 is no less important than the second; the communication must be 'interagency or intra-agency.' 5 U.S.C. § 552(b)(5)." *Klamath*, 121 S. Ct. at 1066.

For information obtained from Government sources, the Supreme Court has held that Exemption 5 incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also United*

States v. Weber Aircraft Corp., 465 U.S. 792, 799-800, 104 S.Ct. 1488 (1984) (*Weber Aircraft*); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

The Deliberative Process Privilege

It is well settled that the deliberative process privilege is among the privileges that fall under Exemption 5. *Klamath*, 121 S. Ct. at 1065. The deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Sears*, 421 U.S. at 150, 95 S. Ct. 1504 (internal quotation marks omitted). The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance "the quality of agency decisions," *id.* at 151, 95 S. Ct. 1504, by protecting open and frank discussion among those who make them within the Government. *See EPA v. Mink*, 410 U.S. 73, 86-87, 93 S. Ct. 827 (1972) (*Mink*); see also *Weber Aircraft,* 465 U.S. at 802.

In order for the deliberative process to shield a document, it must be both *pre-decisional*, i.e. generated before the adoption of agency policy, and *deliberative*, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Id.* The documents in question, being drafts, are generally pre-decisional and deliberative in nature and the Appeal does not contest this point. However, as the Appellant correctly contends, the deliberative process privilege only covers the subjective, deliberative portion of the document. *Mink*, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

Turning to the documents at issue in the present case, we find that the very nature of the draft license applications withheld by ORD under Exemption 5 suggests that significant portions of these documents are clearly factual. In most cases, we would remand this matter to ORD for a segregation analysis. However, in the present case we have found, as the ensuing section will elaborate, that both drafts may be withheld in their entirety under the attorney work product privilege. Therefore, requiring ORD to conduct a segregation analysis would result in a waste of administrative resources on a matter mooted by our holdings on the attorney work product privilege.

The Attorney Work-Product Privilege

The attorney work product privilege is among those privileges incorporated by the courts under Exemption 5. *Coastal States*, 617 F.2d at 862.

The attorney work product privilege protects from disclosure documents which reveal “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Fed. R. Civ. P. 26(b)(3); *see also*

Hickman v. Taylor, 329 U.S. 495, 511 (1947). The work product privilege, which is codified at Fed.R. Civ.P. 26(b)(3), is intended to preserve a zone of privacy in which a lawyer or other representative of a party can prepare and develop legal theories and strategy "with an eye toward litigation," free from unnecessary intrusion by their adversaries. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

This privilege does not extend to every written document generated by an attorney or representative of a party. In order to be afforded protection under the attorney work product privilege, a document must have been prepared either for trial or in anticipation of litigation. *See, e.g.*, *Coastal States*, 617 F.2d at 865. A document is considered to be prepared in anticipation of litigation, if, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice and Procedure § 2024 (1994) (emphasis added) *as cited in United States v. Adlman*, 134 F.3d 1194, 1202 (2nd Cir. 1998). The privilege is not limited to civil proceedings, but rather extends to administrative proceedings. *See e.g., Martin v. Office of Special Counsel,* 819 F.2d 1181, 1187 (D.C. Cir. 1987); *Exxon Corp. v. Department of Energy*, 585 F. Supp. 690, 700 (D.D.C. 1983).

Turning to the present Appeal, it is clear that the Draft License Applications are protected by the attorney work product privilege. The Draft License Applications are preliminary drafts of a document which, once officially issued in final form, begins an adversarial and mandatory administrative litigation proceeding.

Under the Nuclear Waste Policy Act of 1992 § 114(b), DOE is required to apply to the Nuclear Regulatory Commission (NRC) for a license to construct and operate the Yucca Mountain Geological Waste Repository. 42 U.S.C. § 10101. Under the NRC's regulations, DOE's application for this license commences a mandatory and adversarial administrative litigation proceeding. 10 C.F.R. §§ 2.101(f), 2.104(a). Since the License Application is the operative document that triggers this administrative litigation, it is analogous to the complaint in a civil proceeding.

Accordingly, it is clear that the License Application is being prepared in anticipation of this litigation proceeding. The ORD is obviously in the process of preparing a License Application *because of* its desire to commence the NRC's administrative litigation process.

Release of the Draft License Applications would result in the exact type of harm that the attorney work product privilege is intended to prevent. If draft pleadings were released, opposing parties would be provided with the mental impressions, conclusions, opinions, legal strategies or legal theories being considered by DOE for use in the upcoming administrative litigation proceedings before the NRC.

Accordingly, we find that ORD properly withheld the Draft License Applications under Exemption 5's attorney work product privilege.

Adequacy of the Determination

A written determination letter informs the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

The Appeal contends that the withheld documents were inadequately described. We have consistently held that determination letters must (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. *Research Information Services, Inc.*, 26 DOE ¶ 80,139 (1996); *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,767 (1996). In the present case, the descriptions of the documents provided in the Determination Letter clearly meet each of these three requirements and therefore provide an adequate description of the withheld documents.

Public Interest in Disclosure

10 C.F.R., § 1004.1 mandates that "the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." The Appellant contends that release of the withheld information would be in the public interest. We disagree. The chilling of the deliberative process and the compromise of the DOE's ability to defend the public's interests in the administrative litigation proceedings before the NRC that would result from release of the withheld information, as we have discussed above, would not further the public interest. Nor would release of mere drafts, as opposed to information reflecting actual governmental decisions and reasoning, shed any useful light on the operations and activities of the Government.

III. CONCLUSION

For the reasons stated above, we have found that the information withheld under Exemption 5 by the Office of Repository Development was exempt from disclosure under that Exemption. Accordingly, we have concluded that the present appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the State of Nevada, Case No. TFA-0144, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial

review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 24, 2006